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U.S. Citizenship
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FILE:

SRC 05 086 51620

Office: TEXAS SERVICE CENTER

Date: JUN 13 2006

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maui Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on certification. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a professional medical personnel provider. It seeks to employ the beneficiary permanently in the United States as a nurse practitioner pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petitioner further seeks Schedule A, Group I designation in behalf of the beneficiary as a “professional nurse” pursuant to 20 C.F.R. § 656.10(a)(2) and 8 C.F.R. § 204.5(k)(4). Relying in part on regulations that relate to nonimmigrant nurses, 20 C.F.R. § 655, the director determined that Schedule A, Group I included only “registered” nurses, not nurse practitioners.

On certification, counsel submits a brief and additional evidence. For the reasons discussed below, we find that the director erred in determining that nurse practitioners are not professional nurses. The record, however, remains absent evidence of the petitioner’s ability to pay the proffered wage and evidence that the beneficiary has the work experience required on the uncertified Form ETA-750A.

The regulation at 8 C.F.R. § 204.5(k)(4) provides:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, **by an application for Schedule A designation (if applicable)**, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor’s Labor Market Information Pilot Program. **To apply for Schedule A designation or to establish that the alien’s occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition.** The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

(Bold emphasis added.) The petitioner did not submit an individual labor certification from the Department of Labor; rather, the petitioner indicates that it is applying for Schedule A designation.

The regulation at 20 C.F.R. § 656.10 addresses Schedule A as follows:

The Director, United States Employment Service (Director), has determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An alien seeking a labor

certification for an occupation listed on Schedule A may apply for that labor certification pursuant to § 656.22.

(a) Group I:

* * *

(2) Aliens who will be employed as professional nurses; and (i) who have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (ii) who hold a full and unrestricted license to practice professional nursing in the State of intended employment.

The regulation at 20 C.F.R. § 656.10(a)(3)(ii) provides that “Professional nurse” is defined at 8 C.F.R. § 656.50, which has been redesignated as 20 C.F.R. § 656.3. The regulation at 20 C.F.R. § 656.3 defines “Professional nurse” as follows:

[P]ersons who apply the art and science and nursing, which reflects comprehension of principles derived from the physical, biological, and behavioral sciences. Professional nursing generally includes the making of clinical judgments concerning the observation, care, and counsel of persons requiring nursing care; and administering of medicines and treatments prescribed by the physician or dentist; the participation in activities for the promotion of health and the prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as: obstetrics, surgery, pediatrics, psychiatry, and medicine. This definition includes only those occupations within Occupational Group No. 075 of the Dictionary of Occupational Title (4th ed.)

The director acknowledged that nurse practitioners fall within Occupational Group No. 075, but concluded that not all occupations within this group number qualify for Schedule A, Group I designation. The director bases his decision on the inclusion of “registered” in the definition of “nurse” set forth at 20 C.F.R. § 655.1102. The director then compares the educational requirements for nurse practitioners and registered nurses and concludes that they are different occupations. The director then notes that according to the New Mexico Nursing Practice Act, a nurse practitioner is a “substantially different” position than a registered nurse. According to the introduction of 20 C.F.R. § 655.1102, however, the definitions set forth in that section apply to subparts L and M of 20 C.F.R. § 655. Those subparts relate to “H1-C” nonimmigrant registered nurses. Thus, the only use of “registered nurse” is found in regulations that do not relate to Schedule A, Group I. As such, the director’s conclusion that only registered nurses who have not progressed beyond that occupation are eligible for Schedule A, Group I designation is in error. Such designation is open to “professional nurses,” a group defined as including multiple “occupations” at 20 C.F.R. § 656.3. Thus, even if we were to conclude that registered nurses and nurse practitioners were different “occupations,” such a conclusion would not prevent nurse practitioners from falling under the definition of professional nurses at 20 C.F.R. § 656.3.

While we cannot uphold the director's basis of denial, the record contains insufficient evidence to establish the petitioner's ability to pay the proffered wage and that the beneficiary has the necessary experience.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with Citizenship and Immigration Services (CIS). See 8 C.F.R. § 204.5(d). Here, the petition was properly filed on February 2, 2005. The proffered wage as stated on the uncertified Form ETA 750 is \$75,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 2002.

On the petition, the petitioner claimed to have an establishment date in 1986, a gross annual income of \$7,252,648, an undisclosed net annual income and 47 employees. In support of the petition, the petitioner submitted its 2003 Form 1120 U.S. Corporation Income Tax Return containing the following information:

Net income	(\$51,668)
Current Assets	\$472,778
Current Liabilities	\$480,000
Net current assets	(\$52,222)

Although the beneficiary claims to have worked for the petitioner since October 2002, the petitioner did not submit evidence of wages actually paid to the beneficiary. The petitioner also failed to submit any evidence of its financial status after 2003.

In addition, where the employer does go through the labor certification process, the resulting certification is only determinative as to the domestic labor market. CIS still retains the ultimate authority as to whether the alien is qualified for the job certified. *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983). In order to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d

1008 (D.C. Cir. 1982); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). It is the language of the labor certification job requirements that will set the bounds of the alien's burden of proof. *Madany*, 696 F.2d at 1015.

The petitioner indicated on the Form ETA-750A that the job required two years of experience. While the beneficiary lists more than two years of experience on the Form ETA-750B, the regulation at 8 C.F.R. § 204.5(g) provides that evidence "relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received." The petitioner did not submit such letters. As such, the petitioner did not comply with the initial evidence required to support this petition.

While we have noted the lack of evidence relating to the petitioner's ability to pay the proffered wage and the beneficiary's experience, the director never issued a request for additional evidence requesting this missing evidence. As such, we will remand the matter back to the director for the purpose of request such evidence.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.